IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5142 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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INDRASING RANCHHODJI WHAGHELA (THAKORE)

Versus

STATE OF GUAJRAT

Appearance:

1. Special Civil Application No. 5142 of 2002

MR AR SHAIKH for Petitioner No. 1

MR AD OZA, GOVT. PLEADER, for Respondent No. 1-3

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 09/07/2002

ORAL JUDGEMENT

1. By this petition under Article 226 of the Constitution of India, the petitioner- detenu has challenged the legality and validity of the order of detention dated 11.04.2002 passed against him by the

District Magistrate, Banaskantha at Palanpur, in exercise of the powers conferred on him by Section 3(2) of The Gujarat Prevention of Anti-Social Activities Act, 1985 (hereinafter referred to as the PASA Act).

2. For branding the petitioner as "bootlegger" within the meaning of Section 2(b) of the PASA Act and dangerous to the maintenance to the "public order", the sponsoring authority has placed reliance on two registered criminal offences punishable under the Bombay Prohibition Act on 4.4.2001 and 6.2.2002 with Panthawada Police Station. For recording subjective satisfaction, the detaining authority has considered the papers and facts of these two criminal offences and two statements of unnamed witnesses which are at page nos. 62 & 64 of the compilation provided to the detenu.

3. Ld. counsel Ms. Banna Datta for Mr. A.R.Shaikh, ld. counsel appearing for the petitioner has taken me through the entire memo of the petition. The impugned order of detention has been challenged on number of grounds. However, the ld. counsel for the petitioner has concentrated her arguments mainly on one ground that the authority while recording subjective satisfaction has claimed privilege under Section 9(2) of the PASA Act which exercise is neither legal nor proper and is wrong exercise of privilege which has resulted into serious prejudice to the petitioner. On this ground, the petitioner could not make an effective representation to the detaining authority- State Government. Statements of two un-named witnesses have not been verified by the detaining authority itself nor there is any reference in the grounds of detention served to the detenu that the detaining authority had verified the relevant aspect and the authority was satisfied that the apprehension expressed by the two witnesses was genuine. Such verification, according to ld. counsel is must by the authority itself otherwise the privilege exercised under Section 9(2) of the PASA Act would be illegal and this would go to the root of the validity of the order of detention.

4. The petitioner has challenged the legality and validity of the order and continued detention on number of grounds, however, learned counsel for the petitioner has focussed her arguments mainly on one point. The main point assailing the legality of the order is that in the present case, the statement of witnesses whose names are not disclosed were not verified by the detaining authority itself. So, when the detaining authority

itself had not ascertained about the alleged apprehension in the mind of these two witnesses as to their safety, the authority could not have claimed the privilege under sec.9(2) of the Act. In support of her argument, she has placed reliance on the decision in the case of Bai Amina w/o. Ibrahim Abdul Rahim Alla vs. State of Gujarat & Ors., reported in 22 GLR P. 1186. The ratio of this decision was referred to the Full Bench of this Court where the Full Bench has observed that we are also of the opinion that even otherwise also it cannot be said that Bai Amina's case does not laid down a good law. The Full Bench further held, while appreciating the ratio of the decision of Bai Amina's case when this Court was dealing with the case of Chandrakant N. Patel vs. State of Gujarat & Ors., reported in 1994(1) GLR p. 761 that:-

> "the observation which have been made as to when and how the privilege can be claimed are made with a view to show what can be regarded as sufficient for the purpose of claiming privilege; and, when exercise of the privilege can be regarded as bona fide. Whether that privilege has been exercised bona fide and properly or not obviously will have to be decided in each case by reference to the facts of that case."

So, it is rightly argued that the ratio of the decision of Bai Amina's case (supra) reflected in paras-16 and 17 of the decision has been approved by the Full Bench in the case of Chandrakant N. Patel. I have carefully considered both statement by which the detaining authority has claimed privilege under sec. 9(2) of the Act. On the strength of the fact reflected in these two statements, the authority has recorded two different subjective satisfaction. The first satisfaction recorded by the authority is that considering the registered criminal offences and the facts revealed by these two statements, the activity of the detenu is dangerous and prejudicial to the maintenance of public order and the second satisfaction recorded by the authority that the names and other details of these two witnesses are required to be concealed otherwise the safety of these two witnesses or their family members will be adversely affected.

5. Ld. GP Mr. A.D.Oza has placed reliance on the decision in the case of Champakbhai Madhubhai Vasava vs. District Magistrate, Bharuch & Ors., reported in 1997(2) GLH P. 60 and has submitted that the duty of the detaining authority is to strike a balance between the public interest in giving a person under preventive

detention, a reasonable opportunity to make an effective representation against the order of detention by referring to the witnesses and by explaining on their statements should not be acted upon and the public interest in protecting the witness for nondisclosure of their names and addresses. In this cited case, the relevant para of the decision in the case of Chandrakant N.Patel (supra), referred to hereinabove is also quoted in para-15 of the judgment. So, formal verification of the statement by the detaining authority is not important according to Mr. Oza but the important is that the detaining authority must feel satisfied that this is a case where the names and other details of the witness should be kept secret and the same does not requires to be disclosed.

Ultimately, this cited decision has accepted the ratio propounded in the case of Chandrakant N. Patel, (supra) after referring to different decisions including the decision in the case of Bai Amina (supra). On facts, the Division Bench found that the authority has exercised privilege under sec. 9(2) of the Act bona fide while upholding the decision of ld. Single Judge. The Division Bench observed that while considering this aspect in details the ld. Single Judge has rightly held that the privilege claimed by the authority has been rightly claimed. In this cited decision, the detenu was found involved in three different criminal cases registered on 3.12.1994, 20.3.1996 and 21.3.1996 . Over and above these three offences, five different statements recorded by the police i.e. P.S.I. Rajpipla which were also placed before the detaining authority. The Division Bench felt satisfied with the finding recorded by the ld. Single Judge that the authority has exercised the privilege under sec. 9(2) of the Act in the public interest. Copyof the decision of the ld.Single Judge is not before this Court. But, in this cited case, it seems that there must be something on record and it was possible to hold that the apprehension expressed by the witnesses is genuine and the satisfaction is rightly recorded by the detaining authority. The facts of the present case, as mentioned hereinabove, is totally different. The present petitioner, is found involved in two criminal cases.

6. Undisputedly, in the present case, the statement of witnesses have not been verified by the authority nor it is specifically mentioned in the grounds of detention that the authority itself has tried to get satisfied about the genuineness of the apprehension expressed by the authority. This infirmity goes to the root of the

validity of the order of detention. The ratio of the decision reported in the case of Zakirbhai Rahimbhai Nagori vs. District Magistrate, Mehsana & Ors.reported in 1996(1) GLH p. 300 also relevant and it helps the petitioner.

7. In view of the facts and circumstances aforesaid, this petition requires to be allowed and order of detention requires to be quashed and set aside on the sole ground discussed above and hence it is not necessary to discuss other grounds raised in the petition.

8. For the reasons aforesaid, this petition is allowed. Impugned order of detention dated 11.4.2002 passed by District Magistrate, Banaskantha at Palanpur, is hereby quashed and set aside and detenu is hereby ordered to be set at liberty forthwith if he is not required to be detained in any other case. Rule is made absolute.

Direct Service is permitted.

9-7-2002 [C. K.BUCH, J]

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